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BEFORE THE

Federal Communications Commission

JUL 15 1993

TABLE OF CONTENTS

Summary.....	i
Petition.....	1
Background.....	1
Certification is Warranted.....	4
Undisputed Facts.....	7
Conclusion.....	10

SUMMARY

In this pleading, Richard P. Bott, II requests certification by the Presiding Judge to the Commission of the question whether the designated hearing should be held.

Bott shows that the undisputed fact is that in his 1992 declaration he did not represent that he had made a decision to program a commercial religious format during the comparative hearing, and that a fallacious belief to the contrary caused this hearing to be designated.

Bott then shows that on relevant policy as established in a recent Commission decision a grant of this application without hearing is warranted.

JUL 15 1993

Federal Communications Commission FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554 OFFICE OF THE SECRETARY

For Assignment of Construction

) MM Docket 93-155
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) File No. BAPH-920917GO
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RRI's appeal was denied by the U.S. Court of Appeals. Radio Representatives, Inc. v. FCC, 926 F. 2d 1215 (D.C. Cir. 1991).

2. On September 17, 1992 Bott filed an application for consent to assignment of the unbuilt KCVI permit to Western Communications, Inc. in return for Bott's expenses. RRI petitioned to deny the application. RRI argued that "Bott's cavalier choice to blithely abandon his integration pledge" made a mockery of the comparative proceeding (RRI Pet., pp. 6-7), and said that "[t]o grant Bott's assignment application at this time would undermine the very foundation of the Commission's comparative hearing process." (RRI Pet., p. 7.) RRI argued that Section 73.3597(a) of the Commission's rules applied to this application¹, id, and said that Bott "should not be allowed to violate the Commission's rules, abandon his pledge, and sell the station to an outsider. Under the circumstances presented here, the Commission's Rule [apparently § 73.3597(a)] represents an absolute ban on the assignability of the permit at this time." (RRI Pet., pp. 8-9, footnote omitted.)

3. RRI's petition was opposed by the November 10, 1992 pleading attached as Exhibit A, which was supported by Bott's personal declaration dated November 9, 1992, attached to Exhibit A hereto. Bott's opposition argued that Section 73.3597(a) did not apply to the assignment of an unbuilt permit. Citing Eagle 22,

¹ Section 73.3597(a) requires, in relevant part, that an applicant seeking to assign a license or construction permit for a station obtained out of comparative hearing and that has been operating for less than one year make an affirmative factual representation of circumstances justifying the proposed assignment. See §73.3597(a) (1), (4).

Ltd., 7 FCC Rcd 5295 (1992), Bott showed that the Commission had held (only one month before Bott's assignment application was filed) that only Subsections (c) and (d) of § 73.3597 apply to the assignment of unbuilt permits. Bott's opposition went beyond the requirements of the rule to show that his decision to assign the permit was not cavalier or blithe, as suggested by RRI, and did not do violence to the integrity of the Commission's licensing process. Bott's pleading showed that he had a reason, sufficient in Bott's judgment, for making a decision in 1992 to assign the permit at no profit.

4. RRI replied to Bott's opposition. In reply RRI argued that the Commission cannot "allow an applicant simply to abandon its integration pledge simply because it cannot develop the specific 'type' of station it claims it wanted... ." RRI Reply, p. 12. This very argument was rejected by the Commission in Eagle 22, Ltd., supra, decided three months before the submission of RRI's misleading argument. RRI's Reply concluded, at pp. 16-17, with an argument which is, in truth, a call for rule making to amend Section 73.3597, but which has nothing to do with the law as it exists today.²

5. Perhaps most significantly, in view of the present posture of this case, RRI's Reply, in a section headed

² In its Reply, RRI also argued that Bott's decision to assign the permit is a bad business decision, based upon RRI's evaluation of coverage comparisons and program availability, and is certainly not, in RRI's view, of sufficient weight to support the sale of KCVI. The Commission, in Eagle 22, Ltd., supra, rejected this very sort of business judgment second-guessing.

proceeding, in opposing a petition to deny, that, throughout the comparative proceeding, he had always intended to operate with a commercial religious format. HDO, ¶¶ 3, 9. That assertion by the Commission is fallacious. The fallacious predicate for this hearing may have arisen from a simple misreading by the Commission's staff of Bott's declaration, attached to Exhibit A

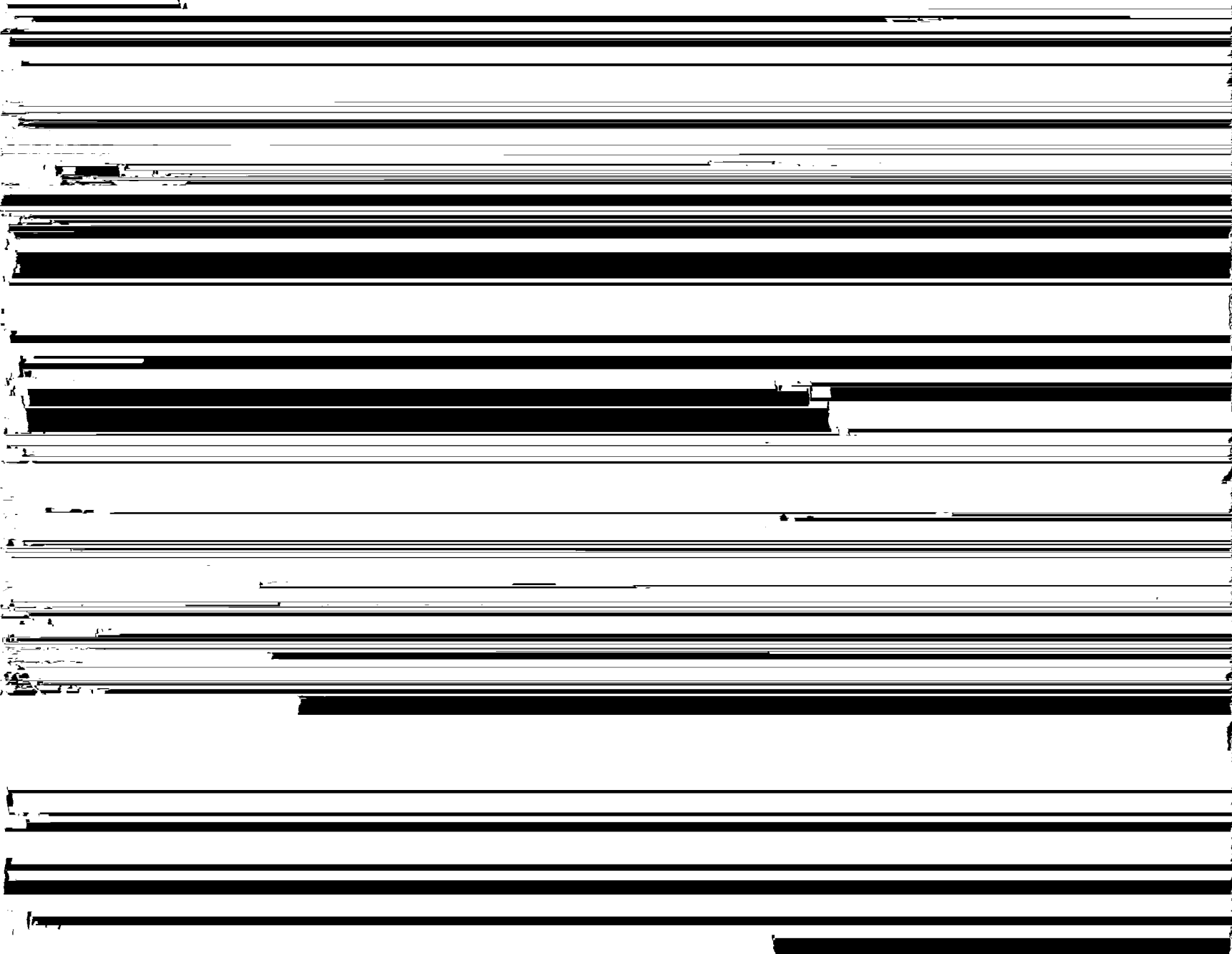
Exhibit A. The Commission's staff has also misread the Commission's belief that Bott's

Bott did violate Section 73.1015 by misrepresenting a fact in his November 2, 1992 declaration -- i.e., that he had made his format decision during the comparative hearing.³ There is no prima facie evidence cited in the HDO that Bott misled the Commission in his 1987 comparative hearing testimony (some of which is quoted, accurately, at ¶ 9 of the HDO) except the mistaken reading of Bott's November, 1992 declaration. If Bott in 1992 did say that throughout the comparative hearing he had intended to use a commercial religious format, and if that 1992 statement were true, only then would Bott's comparative hearing testimony be untrue. In that event, no forfeiture could be imposed on Bott but, upon an adverse conclusion as to Issue (a), this assignment application could be denied. Thus, it is inescapable that the pivotal point in the designation of Issue (a) and in its determination is the fallaciously perceived discrepancy alleged to exist between Bott's hearing testimony and his 1992 declaration.

9. It is clear under governing policy, as recently enunciated in Eagle 22, Ltd., supra, that there is nothing contained in the HDO warranting designation for hearing but the alleged conflict between Bott's hearing testimony and November, 1992 declarations concerning the timing of his format decision. Eagle 22, Ltd. clearly assumes that a permittee will choose its programming before commencing construction of its station, and

³ Nowhere in the HDO is it alleged that there is any evidence, strong or weak, that Bott was moved to sell the KCVI permit for a reason other than that stated by him in his 1992 declaration.

finds nothing to criticize in that natural progression toward the commencement of operations. Id. at 5295, ¶ 2, 5297, n. 14. Thus, the language in the HDO, ¶ 10, asking "why, if Bott previously represented that he intended to proceed without having chosen a particular format, the format issue became so critical later.", is a question not only unreasonable -- one must make a programming decision at a point -- but, of controlling importance, is a question as to which the Commission in Eagle 22. Ltd. says it "will



hearing testimony exists, and relevant portions appear at ¶ 9 of the HDO. His 1992 declaration is attached to Exhibit A. These are the only facts, and there is no dispute as to these facts.

Policy in Effect

11. One month prior to the filing of this assignment application, the Commission unanimously adopted its Memorandum Opinion and Order in Eagle 22, Ltd., supra. In Eagle 22, Ltd., the Commission stated: "The Assignment of Channel 22, an unbuilt station, is subject only to, and has met, the provisions of Section 73.3597 (c)-(d), which limit the consideration for the sale of an unbuilt station to legitimate and prudent expenses incurred in connection with the construction of a station." Id., 3297 (footnotes omitted). The Commission explicitly rejected the contention that the sale of Eagle's unbuilt permit could not be approved without hearing unless Eagle made an affirmative factual showing of changed circumstances sufficient to justify the sale. Id.

12. Moreover, Eagle had, like Bott, received its permit through a comparative hearing.⁴ Eagle's superiority over its comparative competitor was, like Bott's, "based upon the credit awarded for integration of ownership with management control." Fort Collins Telecasters 103 F.C.C. 2d at 988. Eagle, having de minimis media interests and its competitor having no media interests, had been found equal to its comparative competitor with

⁴ Fort Collins Telecasters, 103 F.C.C. 2d 978 (Rev. Bd. 1986), review denied, 2 FCC rcd 2780 (1987), aff'd per curiam, 841 F. 2d 428 (D.C. Civ. 1988).

respect to the diversification criterion. Among the results of Eagle's sale of its unbuilt permit to group owner Chase Communications Corporation, approved by the Commission in August, 1992, is the elimination of Eagle's ownership integration; the joint ownership by Chase of channel 22 and KDVR(TV) in nearby Denver; Grade B contour overlap between channel 22 and KDVR; and operation of channel 22 by Chase as a satellite of KDVR. Eagle 22, Ltd., supra.⁵

13. Eagle was required to demonstrate, in support of its assignment application, why channel 22 could not be operated as a non-satellite television station as it had proposed in the comparative case, a requirement arising under the Commission's satellite station policy and not from the unbuilt status of the channel 22 permit. In Eagle 22, Ltd., the Commission said: "While WGN [opposing Eagles' satellite policy showing] contends that these difficulties were not insurmountable, we do not require that an assignor exhaust all programming possibilities and we will not engage in speculation as to which programmers Eagle should have contacted in order to proceed with its initial plans for a full-service station." Id. at 5297, n. 14.

14. If, in a proceeding where an explanation of an applicant's basis for a requested assignment is required, as in

⁵ Radio Representatives, Inc., in its Reply to Bott's Opposition in the instant case, misstates Fort Collins Telecasters by asserting that Eagle would have prevailed without integration (and, presumably, while burdened on the diversity criterion as is Eagle's assignee) because of "white area" superiority. Nothing in the decision supports that conclusion.

avoid that acknowledgement, the Bureau is misreading, or misquoting, the HDO. In opposing reconsideration, the Bureau improperly quotes HDO ¶ 13 at ¶ 4 of its opposition, to say that the Commission has questions about Bott's comparative hearing representations independent of any conflict with Bott's 1992 declaration. That is not so. Like the rest of the HDO, ¶ 13 is a

undisputed fact (i.e., Exhibit A) shows;

(2) In the absence of misrepresentation by Bott, this application would have been granted pursuant to governing policy, as set forth in Eagle 22, Ltd., supra. Yet ¶ 12 of the HDO is, without making any reference to Eagle 22, Ltd., wholly at odds with that recent, governing ruling.

It would not be fair to the Commission to assume that when the HDO was adopted it would have been adopted even had the Commissioners known that (1) Bott did not say in 1992 that he had always intended a commercial religious format, and (2) that the legal analysis in the HDO, particularly at ¶ 12, is irreconcilable with Eagle 22, Ltd. The Commissioners should, in fairness to themselves, to Bott, and to the public which is paying the costs of this proceeding, be given the opportunity on certification to consider this proceeding with a correct understanding of what Bott said in 1992 and what Eagle 22, Ltd. held.

Respectfully submitted,

RICHARD P. BOTT, II

By: 

James P. Riley
Kathleen Victory
His Attorneys

Fletcher, Heald & Hildreth
11th Floor
1300 North 17th Street
Rosslyn, Virginia 22209
(703) 812-0400
July 15, 1993

PETITION FOR CERTIFICATION TO COMMISSION
EXHIBIT A

WASHINGTON, D. C. 20554

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More than seven years ago, on July 11, 1985, Mr. Bott filed an application for a new FM station in Blackfoot, Idaho. Two years later, Mr. Bott's application and six others were designated for comparative hearing. Hearing Designation Order, 2 FCC Rcd 3897 (released July 1, 1987). A one-day hearing, involving the three then-remaining applicants was held December 2, 1987. An Initial Decision followed a year thereafter. 3 FCC Rcd 7094 (ALJ Luton,

released Dec. 12, 1988). The ALJ granted Mr. Bott's application. The Review Board thereafter affirmed the grant. Decision, 4 FCC Rcd 4930 (released June 5, 1989). The Commission subsequently denied an Application for Review which RRI filed. Order, 5 FCC Rcd 2508 (released April 12, 1990). RRI took an appeal to the United States Court of Appeals for the District of Columbia Circuit. The Court filed a judgment denying RRI's appeal on February 22, 1991.^{1/}

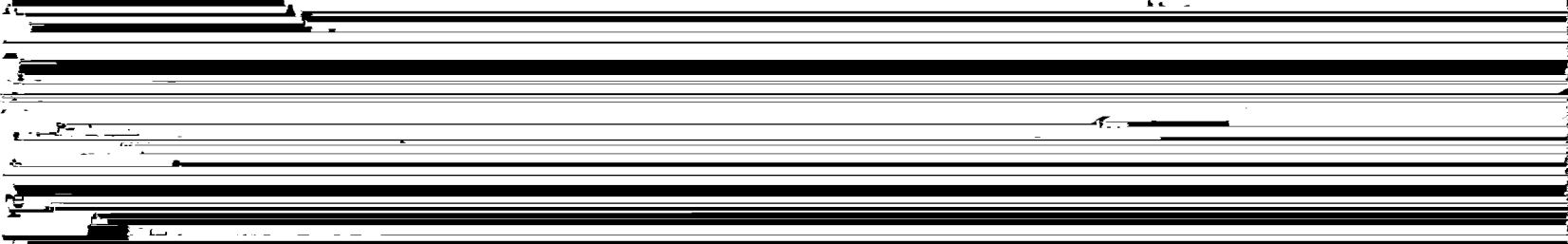
opportunity had closed for establishment of the type of radio station Mr. Bott had decided to operate -- a commercial station with a religious format.

As detailed in Mr. Bott's attached Declaration, several months after the Court's judgment was entered, and while Mr. Bott was in the process of making arrangements regarding the Blackfoot station, he learned that a station in the nearby community of Chubbuck, Idaho, had adopted a religious programming format essentially identical to that which he had hoped to implement.

This development dramatically changed the situation in the market. The Chubbuck station had a tremendous head start. Mr. Bott knew that it would be many months before he could get his station on the air. He also knew the market was too small and the economy too soft to support two commercial religious stations.

In light of this significant change in circumstances, Mr. Bott, although he had expended tens of thousands of dollars and some six years in an effort to obtain the Blackfoot permit, eventually reached the conclusion that he should accept an offer he received to assign the permit. It is important to note Mr. Bott will not profit by assignment of the KCVI construction permit. He simply will recoup the expenses he legitimately and prudently incurred in obtaining that construction permit.

Stated directly and simply, Mr. Bott's decision to assign the station's construction permit was engendered by circumstances that



Bott advanced his integration proposal in good faith and without guile. Mr. Bott in no way has perpetrated a fraud upon the Commission or, for that matter, the Court of Appeals. RRI has presented no evidence to support its unfounded and hysterical allegations.

**RRI LACKS STANDING AND
ITS PETITION IS DEFICIENT**

RRI has not alleged any basis on which it has standing to submit a petition to deny. Nothing indicates that any RRI principal has become a resident of the Blackfoot station's anticipated service area, or that the Blackfoot station would cause interference to any RRI station. Furthermore, RRI's status as a former applicant for the Blackfoot allotment does not confer standing to challenge the above-captioned assignment application. E.g., WCTW, Inc., 26 FCC 2d 268, 269 n.2 (1970); accord, e.g., McClatchy Newspapers, 73 FCC 2d 171, 173 (1979) (mere applicant does not have standing to challenge application); Norman A. Thomas, 53 FCC 2d 646 (1975) (same).

Furthermore, and more importantly, RRI has failed to satisfy the bedrock requirement of Section 309 of the Communications Act that allegations "be supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. §309(d)(1). RRI has presented no affidavit in support of its allegation that Mr. Bott has committed a fraud upon the Commission and the Court. Under the circumstances, RRI's petition should be summarily dismissed.

**RRI'S RELIANCE ON SECTION
73.3597(a) OF THE RULES IS MISPLACED**

RRI argues in its petition that Section 73.3597(a) of the Commission's Rules compels designation of this application for hearing. It cites specifically Section 73.3597(a)(1), which provides that an application for assignment will be designated for hearing if the station involved "has been operated by the current licensee or permittee for less than one year," unless the FCC is able to find, inter alia, that "(1) The permit or license was not authorized . . . after a comparative hearing"

Of course, RRI fails to quote subparagraph (4) of the rule which provides that designation for hearing is not required if the FCC is able to find:

The assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that, due to unavailability of capital, the death or disability of station principals, or to other changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, FCC consent to the proposed assignment or transfer of control will serve the public interest, convenience and necessity.

47 C.F.R. §73.3597(a)(4) (emphasis added).

Here, as Mr. Bott's Declaration demonstrates, significant changed circumstances affecting his proposed construction and operation of the Blackfoot station occurred subsequent to the acquisition of the permit. Furthermore, grant of the assignment

application will serve the public interest in that it will lead to the prompt initiation of service on the allotment by the assignee.

Furthermore, the Commission has ruled explicitly that Section 73.3597(a) is applicable "solely to operational stations, not to unbuilt stations." Eagle 22, Limited, 7 FCC Rcd 5295, 5297 (1992), citing, TV-8, Inc., 2 FCC Rcd 1218, 1220 (1987).^{2/} The assignment of an unbuilt station such as KCVI is subject only to the provisions of Section 73.3597(c)-(d), which limits the consideration for sale of an unbuilt station to the legitimate and prudent expenses incurred in "preparing, filing and advocating the grant of the construction permit for the station and for other steps reasonably necessary toward placing the station in operation." 47 C.F.R. §73.3597(c)(2). Here, through an amendment filed October 14, 1992, Mr. Bott demonstrated compliance with Section 73.3597(c)-(d).

**GRANT OF THE ASSIGNMENT APPLICATION DOES NO VIOLENCE
TO THE INTEGRITY OF THE COMMISSION'S LICENSING PROCESSES**

To reiterate, circumstances arising months after the Court of Appeals affirmed grant of his construction permit led to his decision to assign the station. Mr. Bott will gain no profit from the transaction, but merely will recover the expenses incurred. Obviously, no motivation exists for an applicant to go through a

^{2/} In support of its argument that Section 73.3597(a) is applicable, RRI cites TV-8, Inc. In fact, that case explicitly holds that the hearing requirement of Section 73.3597(a) does not apply to an unbuilt station. 2 FCC Rcd at 1220.

six-year licensing process, including adjudications before an Administrative Law Judge, the Review Board, the Commission itself, and the Court of Appeals, simply to recoup, without interest, the funds he previously expended. There will be no rush on the part of speculators to go through the ordeal Mr. Bott has. The fact Mr. Bott's window of opportunity closed after grant of his construction permit should not result in Mr. Bott being penalized the entire amount of his investment in obtaining the construction permit. Similarly, the public interest would be ill-served by denying the assignment application and thus delaying initiation of service on the frequency. The assignee is fully qualified to construct and operate the station. It should be permitted to do so.

WHEREFORE, the Petition to Deny filed by Radio Representatives, Inc. should be DISMISSED or DENIED IN ALL RESPECTS.

Respectfully submitted,

RICHARD P. BOTT, II

By



HARRY C. MARTIN
MATTHEW H. MCCORMICK

Its Counsel

Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

November 10, 1992

DECLARATION
OF
RICHARD P. BOTT, II

(Original submitted with Opposition
to Petition to Reopen the Record)

STATEMENT OF RICHARD P. BOTT, II

In 1985 I decided that it would be good for me to build my own radio stations and go into business for myself. In July, 1985 I filed an application for a new FM frequency in Central Valley, California and an application for a new FM frequency in Blackfoot, Idaho. I selected Blackfoot, Idaho after studying the market as a broadcast market, and studying the competitive situation in the area.

When both applications became designated for hearing at approximately the same time in the summer of 1987, I realized that I then needed to decide where I was going to live and make my home. It was then that I decided to move to Blackfoot and personally run that station.

In September 1987 I traveled to Blackfoot. I met with community leaders, and I looked at available homes and studio space that a real estate agent had picked out for me.

Over the next several years I was disappointed with how long it was taking for this application to go through the comparative hearing process, but it remained my intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when I received the C.P. Throughout this time, I have rented an apartment in Kansas City rather than buy a house, in anticipation of moving to Blackfoot.

In April of 1990, the FCC finally granted the Blackfoot Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the